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ARTICLES

Avoiding Lawsuits over False Advertising on the Internet

By Gary L. Beaver – November 3, 2011

As the economy continues to stagger, businesses are becoming more aggressive in seeking customers through advertising, which often includes an Internet component. Businesses have become more sophisticated in scrutinizing competitors' Internet advertising and seem less reticent to challenge such advertising. Attorneys specializing in consumer-protection class actions are filing creative pleadings attacking companies for ads that, even if false in insignificant ways, may, in the context of a class action, cost the company posting the ad millions of dollars. Likewise, the Federal Trade Commission (FTC) appears to be taking a more aggressive stance in examining and challenging Internet advertising as it updates its 11-year-old Rules of the Road for Internet advertising.

Recent cases in which either private plaintiffs or the FTC made false-advertising claims in which at least part of the challenged advertising was published on the Internet provide some clues about what not to do. Please note that some of the examples of infringement are of unproven claims; they are provided to show what led to the filing of the lawsuits or what has to be shown to defend the lawsuits.

Don't Just Make Things Up

Boldness is no substitute for good judgment. For example, on April 19, 2011, the FTC announced efforts in federal court to stop 10 operators from using fake news websites to market acai berry weight-loss products. The FTC alleges that the websites are set up to look like legitimate news organizations, make false statements about investigations and weight loss examples, include phony consumer testimonials, and fail to disclose the financial relationship between the site operators and the acai product sellers. Apparently, some even claim the reports on the website come from named, well-known, legitimate news organizations when they were not. It is not hard to guess how this turns out.

Don't Make Claims Without Adequate Substantiation Evidence

This is where most of the friction occurs. Competitors are going to review ads for accuracy. It does not matter if advertisers are deluded true believers or people who have evidence that does not quite make the grade. They must substantiate the claimed wonders of their products and services. How good is the evidence backing up the claims? Is the advertiser puffing or making actionable fact statements? Are there medical or scientific studies or customer surveys that properly support the claim? Are the studies objective? Not surprisingly, many studies provide results favorable to the companies/industries that pay for them. Your adversary will attack their credibility. Here are some recent lawsuits in this area:

- Class actions have been filed against athletic shoe companies New Balance and Reebok for claims that just wearing and walking around in their shoes tones leg muscles.
- In March 2011, Power Balance, LLC, agreed to pay more than \$57 million to settle a class-action claim that it falsely advertised on websites that its products improve customers' balance, strength, and flexibility through holograms embedded in bracelets and other products that react to the body's natural energy field.
- General Mills and Yoplait USA, Inc., were denied summary judgment in a consumer class action alleging false advertising about the health benefits of probiotic bacteria in YoPlus yogurt. The case may have been triggered when competitor Dannon filed a complaint with the Better Business Bureau, which then chastised General Mills for the claims. A similar lawsuit is pending against Procter & Gamble regarding its probiotic supplement Align.

The substantiation problem causes special concern with respect to health claims, as those will draw the close scrutiny of competitors, the Food and Drug Administration (FDA), the FTC, and the consumer class-action bar. For example, in December 2010, consumers filed a class action against a Kansas winery for claiming its elderberry juice was a medicinal product with curative properties. The FDA sent a warning letter to the winery four years earlier that its website claims meant the juice was a drug, was misbranded, and could not be sold without FDA approval. The winery apparently ignored the FDA.

Be Cautious and Conservative in Comparative Advertising

Competitors will sue if an ad attacks their products or services, so advertisers need to be able to substantiate the comparison. They may be sued even if they have the substantiation, so they need to budget for legal costs. Lawsuits in this area include the following:

- In January 2011, Jackson Hewitt, Inc., sued H&R Block, Inc., for claiming in a nationwide advertising campaign, including statements on H&R Block websites, that it found errors on two out of three tax returns done by other preparers.
- Even advertising comparing two of a company's own products can lead to a lawsuit. P&G's Gillette was sued for advertising that its Fusion Power razors were superior to its cheaper Fusion manual razor cartridges. However, the lawsuit was dismissed with leave to amend on May 17, 2011.

Don't Throw Mud

In May 2011, a PR firm hired by Facebook tried to plant negative stories about Google with newspapers. When one reporter published the effort and the email evidence, the black eye was worn by Facebook, not Google.

Comply with the FTC Endorsements Guidelines

The FTC's guidelines governing endorsements and testimonials in advertisements are not binding law, but they are administrative interpretations that hold great weight in enforcing the FTC Act against deceptive advertising. The guidelines were modified on December 1, 2009. The



most significant change is the removal of the 29-year-old safe harbor that allowed a testimonial to describe unusual results from the use of a product or service so long as the testimonial included a disclaimer such as “results not typical.” Now, advertisers must have proof that the experience or results described advertising is “representative of what consumers will generally achieve,” or the ad must “disclose the generally expected performance in the depicted circumstances.”

The guidelines now make it explicit that the FTC can prosecute both advertiser and endorser for making false statements or for failing to disclose material connections between the advertiser and the endorser. Advertisers need to be careful not to publish endorsements from friends, families, or compensated endorsers without full disclosure. An endorser must be a “bona fide” user of the product endorsed and must continue to be a bona fide user of the product for as long as the ad runs. If the celebrity stops using the product, the advertiser must stop using the endorsement.

The FTC is not the only one acting against false endorsements. In 2002, Sony entered into a settlement with the State of Connecticut for using fake “person on the street” interviews in which Sony employees pretended to be moviegoers praising Sony movies that they claimed to have just viewed.

An expert endorsement must be supported by an actual exercise of the expert’s expertise in evaluating the product and must include an examination or test of the product at least as extensive as someone with the same level of expertise would normally need to conduct to support the conclusion in the endorsement. The FTC has not added a requirement for peer-reviewed evidence or studies to support a conclusion, but an example the FTC recently added to the guidelines certainly pushes the standard for acceptable expert advertising in that direction.

Advertisers should not manufacture phony endorsements. Posting phony endorsements in online bulletin boards or elsewhere online shows the poster is willing to deliberately mislead the public to enhance sales and, therefore, is not credible with respect to any aspect of its challenged business practices. This is great evidence for a plaintiff.

Don’t Trade on a Competitor’s Good Will

Trademark and copyright infringements are often a form of false advertising as a company tries to use the good will and reputation earned by a competitor’s product to either draw consumer attention to its own product or to confuse consumers into thinking its product is somehow associated with the product that is already well regarded. On the Internet, trademarks are used to falsely advertise in many ways, including use of another’s trademarks or of slightly misspelled trademarks in domain names or using another’s trademarks in keywords or metatags where there is no appropriate use of the trademark in website text. (It is often a fair use to use another’s trademark in a comparative ad.) Similarly, copying another’s famous products and advertising them as your own can lead to a copyright infringement. Some cases involve both types of infringement; in April 2011, Disney and Hanna-Barbera sued Costume World, Inc., for both

types of infringement for selling through Internet websites allegedly infringing costumes based on cartoon characters.

A company should carefully consider how best to protect its products and services through the use of registered trademarks and then regularly search the Internet for any infringing uses of those trademarks. Even if a company's common-law trademarks are not yet registered, it should monitor the Internet for possible infringements. Use cease-and-desist notices to try to stop such abuses. If necessary, escalate to proceedings in federal or state courts or proceedings before the National Advertising Division (NAD), National Arbitration Forum, or World Intellectual Property Organization.

Other Internet Advertising Issues

Survey Evidence

Proving customer confusion if you are challenging a competitor's actions or proving substantiation of consumer preferences stated in your client's advertising are often done by survey. Internet surveys are usually cheaper and faster than other forms of surveys, but there are many inherent weaknesses in their accuracy. You should not compound those weaknesses with skewed questions designed to get the result you want. At some point, you may have to prove in court that it was reasonable to rely on your survey.

Personal Jurisdiction

Not every ad on the Internet can be the basis of a lawsuit in every jurisdiction in which the Internet reaches—that is, all of them. You should understand in which jurisdictions your client can be dragged to court and why. Generally, if a company targets someone or some group in a particular state with advertising or if it does a substantial amount of business of any kind in that state, then it may be subject to jurisdiction in that state.

Use of False-Advertising Claims as Means of Competition

MGA Entertainment, Inc., filed suit in a California federal court against electronic toy competitor Innovation First, Inc., alleging Innovation made false and misleading statements to the public and to retailers that its competitors, including MGA, had stolen design components related to a popular toy made by Innovation. MGA's lawsuit was dismissed for lack of personal jurisdiction. Innovation already has a lawsuit pending in Texas state court against MGA for patent infringement. We should expect to see more allegations like these from companies represented by creative attorneys making close examinations of statements made by their clients' business competitors on the Internet or elsewhere.

To avoid a lawsuit over false advertising, a company would be well advised to do the following:

- Use a system to review in advance all public statements, including Internet advertising, to identify claims needing substantiation and gather sufficiently reliable substantiation;



- Where appropriate, work with scientists, engineers, and other technical personnel to ensure that they understand the legal standards for substantiation and that marketing personnel understand whether the technical information meets those standards;
- Develop proper survey evidence if it is to be used in advertising; and
- Obtain a legal review of any advertising that makes claims requiring substantiation or that directly criticizes or compares to competitors' products.

Even if a company does everything right, it may be sued by a competitor who simply does not believe that the company can substantiate its claims or is using litigation as a means of hurting the company's pocketbook or reputation. All a company can do is try its best to be accurate and be prepared to fight back swiftly and effectively.

Keywords: litigation, commercial, business, false advertising, Internet, substantiation

Gary L. Beaver is with Nexsen Pruet, PLLC, in Greensboro, North Carolina.

Contributory Trademark Infringement: An Issue for Web Hosts

By James Billings-Kang – November 3, 2011

The Internet has spawned a vast, continually growing landscape of interconnectivity that links a multitude of entities and builds relationships on a global scale. Embedded in this interconnectivity is the possible extension of liability on one entity as a result of the actions of another. Perhaps one new trend is holding web hosts liable for assisting e-commerce businesses in the sale of counterfeit goods. For instance, a federal jury in South Carolina recently ordered a web host to pay 27 times more than the actual trademark infringer who had used the web host's server in its sale of counterfeit goods. *Roger Cleveland Golf Co., Inc. v. Prince*, 2010 WL 5019260 (D. S.C. Dec. 3, 2010). At issue in *Cleveland Golf* was trademark infringement by counterfeiting—a problem that has catapulted to new levels since the advent of the Internet. In fact, according to one estimate, counterfeiting equates to a \$600 billion-a-year global industry. Ambrose Clancy, "[Faking It: Nothing Phony About Profits in the Knockoff Business](#)," *Long Island Business News*, July 2, 2009.

Roger Cleveland Golf

Christopher Prince hired Bright Builders to develop a website for his golf club-counterfeiting business that was "your one stop shop for the best COPIED and ORIGINAL golf equipment on the internet." Over the course of the website's development, Bright Builders engineered search engine optimization into the site—essentially "embedding keywords, such as Plaintiff's federally registered trademarks, into metadata within [Prince's] websites." *Roger Cleveland Golf v. Prince*, 2010 WL 5019260 at *2 (D.S.C. Dec. 3, 2010). Additionally, Bright Builders mentored

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Prince, even providing him with a Help Team and, at times, coaching him about the website's development and advising him on how to run his business and what vendors to work with.

Upon discovering that the golf clubs sold on Prince's website—copycatclubs.com—were counterfeits of its own clubs, the plaintiff, Roger Cleveland Golf, initially sued only Prince. The plaintiff contended that Prince had violated the Lanham Act and South Carolina's Unfair Trade Practices Act. Further investigation led Roger Cleveland Golf to add Bright Builders as a codefendant for its assistance with the website, thereby claiming that Bright Builders was contributorily liable for the trademark infringement, among other claims.

The court denied Bright Builders' motion for summary judgment, with the jury ultimately finding Bright Builders liable for willfully committing contributory trademark infringement and awarding \$770,750 to Roger Cleveland in damages, while Prince was hit with a relatively minimal \$28,250 damage award.

Contributory Trademark Infringement

Under the Lanham Act, which governs federally registered trademark-infringement claims, a trademark is a word, name, symbol, or device used to distinguish an entity's good from goods manufactured or sold by others. 15 U.S.C. § 1127 (2006). To state a claim for trademark infringement, the plaintiff must prove a "trademark use"—in other words, the plaintiff must prove that the defendant used the mark "in commerce" and "in connection with the sale, offering for sale, distribution or advertising of goods and services." *See Gov't Employees Ins. Co. v. Google, Inc.*, 330 F. Supp. 2d 700, 702 (E.D. Va. 2004); *see also* 15 U.S.C. § 1114, 1125(a). Additionally, trademark users must prove "valid trademark, ownership of the trademark, and likelihood of confusion." Jerome Gilson, *Trademark Prot. & Practice* 11.07 [2] (2004). As to a finding of likelihood of confusion, courts will make a factual determination based on a variety of factors, including strength of the mark, proximity of the goods, similarity of the marks, and evidence of actual confusion, among others. *Playboy Enters., Inc. v. Netscape Commc'ns Corp.*, 354 F.3d 1020, 1026 & n.24 (9th Cir. 2004).

Originally, the doctrine of contributory trademark infringement included only an inducement standard and applied strictly in situations involving manufacturers or distributors. *See, e.g., Societe Anonyme de la Distillerie de la Liqueur Benedictine de L'Abbaye de Feccamp v. W. Distilling Co.*, 42 F. 96 (E.D. Mo. 1890). Over the years, courts have modified this doctrine with insights from the common law of torts. In 1982, the U.S. Supreme Court expanded the doctrine such that a party may be contributorily liable for the direct trademark infringement of another if it (a) "intentionally induces another to infringe a trademark" or (b) "continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement." *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 854 (1982).

The *Inwood* test later permeated the landlord setting by the Seventh Circuit in 1992, *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143 (7th Cir. 1992), and by the Ninth Circuit in 1996, *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259 (9th Cir. 1996). Both cases

stand for the proposition that, when the operators of a flea market or swap meet know or have reason to know that its vendors are committing trademark infringement, they could be contributorily liable for the infringement. The rationale lay in “treat[ing] trademark infringement as a species of tort,” pointing to the common-law rule that landlords were responsible for torts committed on their premises if they know or have reason to know that the tenant will act tortiously. *Hard Rock Cafe*, 955 F.2d at 1148–49.

Application of the *Inwood* Test in the Internet Age

With the advent of the Internet, courts have wondered how to apply traditional legal doctrines in a modern setting. No doubt the Internet has created more opportunities for trademark infringement, with a widespread impact never seen before. No longer is an infringement scaled within a single brick-and-mortar setting; now, the world has become the setting for any infringement present on the Internet, thereby increasing the likelihood that others may be contributorily liable for the infringement of third parties.

Appreciating the unique context of the Internet, the Ninth Circuit extended the *Inwood* test in this new setting but with a few modifications. *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980 (9th Cir. 1999). The *Lockheed Martin* court understood that, unlike the traditional applications of the *Inwood* test in the past, present before the court was a dispute over a service—similar to the brick-and-mortar services provided in *Hard Rock Cafe* and *Fonovisa*. The plaintiff in *Lockheed Martin Corp.* contended that the defendant domain name registrar was responsible for those who registered domain names that contained the plaintiff’s mark.

Citing *Hard Rock Cafe*’s and *Fonovisa*’s emphasis on control when analyzing a services setting, the *Lockheed Martin* court ruled that contributory liability for trademark infringement hinged on “direct control and monitoring of the instrumentality used by a third party to infringe the plaintiff’s mark . . .” *Lockheed Martin*, 194 F.3d at 984. The Third Circuit has since equated “direct control” with “central participation” in the infringement. *Basketball Mktg. Co., Inc. v. FX Digital Media, Inc.*, 257 Fed. App. 492, 495 n.5 (3d Cir. 2007).

The question of direct control was one such issue in *Louis Vuitton Malletier, S.A. v. Akanoc Solutions, Inc.* The district court noted that, while denying the defendant web host’s motion for summary judgment on the contributory trademark infringement claim, the defendant had hosted sites that contained counterfeit goods and even routed traffic to and from these sites. Just as significant was the defendant’s ability to remove infringing materials and disable individual IP addresses. *Louis Vuitton*, 591 F. Supp. 2d 1098, 1111–12 (N.D. Cal. 2008). Interestingly, the court suggested that the test for “direct control” must rise to a level that satisfies the knowledge prong of the *Inwood* test; that is, the control was to such an extent that the defendant knew or had reason to know of the infringement. *Louis Vuitton*, 591 F. Supp. 2d at 1111.

As to the level of knowledge necessary to satisfy the second prong of the *Inwood* test, *Tiffany (NJ) Inc. v. eBay* pronounced that the plaintiff must prove that the defendant knew or had reason to know “specific instances of actual infringement.” *Tiffany (NJ) Inc. v. eBay*, 576 F. Supp. 2d

463, 510 (S.D.N.Y. 2008), *rev'd on other grounds*, 600 F.3d 93 (2d Cir. 2010). In other words, it is not enough for a defendant to possess a general knowledge of infringement. However, when a defendant suspects “wrongdoing and deliberately fail[s] to investigate,” that is considered willful blindness, which will inevitably satisfy the knowledge prong. *Id.* at 513. The court further elaborated that “willful blindness requires ‘more than mere negligence or mistake’ and does not lie unless the defendant knew of a high probability of illegal conduct and purposefully contrived to avoid learning of it. . . .” *Id.* at 515.

Trends and Preventative Measures

At first glance, the implications of *Roger Cleveland Golf* appear to be far-reaching. Nevertheless, District Judge Margaret Seymour noted that Bright Builders, in response to the Amended Complaint, had filed a “one-and-a-half page motion, which argue[d]—without a single citation to any authority or facts in the record and without the benefit of any supporting affidavits or exhibits—that it should be dismissed as a defendant from this action.” As such, this was “reason alone to deny Bright Builders’ motion” for summary judgment. *Roger Cleveland*, 2010 WL 5019260, at *2–3.

Whether the *Roger Cleveland* ruling was a result of a procedural mishap remains unanswered, but the trend is that those claiming trademark infringement are now looking to hold the web hosts and Internet intermediaries liable as opposed to the direct infringers. *See, e.g., MGM Studios, Inc. v. Grokster, Ltd. (Grokster II)*, 545 U.S. 913, 930 (2005). As such, Internet intermediaries should consider taking myriad preventative measures to shelter themselves from such allegations.

Inevitably, *Roger Cleveland* teaches us that the more intimate a web host is in its involvement with an e-commerce business, because of the potential imputation of constructive knowledge, the more vigilant it must be in addressing potential infringement issues. Although the *Tiffany v. eBay* court stated that the policing of sites for trademark infringement is not necessary, web hosts directly involved in the constant development of a website—whether through coding, strategic advising, implementing search engine optimization, and the like—should monitor for any hint of trademark violation, ultimately removing any page or website that includes such violations. If technologically possible, the web host should implement programs that detect violations by its clients. Further, notices of infringement may rise to the level of specific knowledge necessary to satisfy the *Inwood* test, thereby requiring the eventual removal of the suspected material after receipt of such notices. *eBay*, 576 F. Supp. at 516.

Any contract that legitimizes the web host–client relationship should include clauses that require the client to adhere to any trademark laws, in addition to an indemnity clause that demands the client to pay for any defense costs as a result of litigating the client’s infringement violations. Of course, to the extent that the client may not be solvent enough to cover the defense costs, the indemnity clause may be moot. In fact, Bright Builders had one such clause in its contract with Prince, which proved ineffective. A limitation-of-liability provision limited to the amount the

client has paid to the web host may prove valuable, perhaps preventing such instances where a web host is required to pay 27 times more than the direct infringer.

Furthermore, the contract should include representations by the client that she has all the appropriate licenses to the trademarks used as well as any and all necessary intellectual property rights. In the end, though, any firm must exercise sound judgment and not—without acute analysis—passively include anything on a website that a client requests. When an e-commerce site conspicuously provides signs of counterfeiting in its URL designation, slogans, or product titles, to name just a few, the firm must immediately notify the client of a potential takedown and then, should the infringement persist, proceed with the takedown.

Keywords: litigation, commercial, business, contributory trademark infringement, e-commerce, Internet

James R. Billings-Kang is an associate at Blank Rome, LLP.

Wikipedia Dispute Resolution

By Thomas C. Goodhue – November 3, 2011

In 2005, an anonymous computer user posted on Wikipedia what he claimed was a biographical sketch of a former assistant to Attorney General Robert Kennedy. The sketch suggested that the former assistant—who has since become a prominent journalist—was directly involved in the assassinations of both John F. and Robert Kennedy. The article was a shocking hoax. *See* John Seigenthaler, “A False Wikipedia ‘Biography,’” *U.S.A. Today*, Nov. 29, 2005, at 11A. Only after the former aide appealed to Wikipedia founder Jimmy Wales was the article completely removed from the website.

As common sense suggests and this incident confirms, there are clear dangers inherent in Wikipedia. Wikipedia is a web-based encyclopedia written and edited by hundreds of thousands of largely anonymous volunteers. Katharine Q. Seelye, “Rewriting History: Snared in the Web of a Wikipedia Liar,” *N.Y. Times*, Dec. 4, 2005, at 41. On Wikipedia, anyone can register as a user by merely providing a password and user name. *See* [Wikipedia: About](#), Wikipedia (May 20, 2011, 10:30:30 p.m.). Once registered, a user is free to submit new articles on topics or to edit articles written by others. Using this system, Wikipedia claims to have collected more than 17 million articles in more than 270 languages.

Inevitably, perhaps, Wikipedia users will sometimes publish inappropriate material like the biographical sketch of the former Kennedy aide. Once published, such material has the potential to reach a very large audience. According to one study, in September 2010, Wikipedia was the sixth-most-visited website in the world, ranking it ahead of such popular websites as Twitter, Craigslist, and LinkedIn. Lee Barney, “Fund Firms Get Hip to Social Media Beat,” *Money Mgmt. Executive*, March 7, 2001, at 1.

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Recognizing its potential misuse, Wikimedia, the nonprofit foundation that operates Wikipedia, has implemented a number of policies and procedures to help users combat the publication of inappropriate material. While most of these procedures are open only to Wikipedia users, anyone can register as a user by visiting the Wikipedia registration page and providing a user name and password. See [Log In/Create Account](#), Wikipedia.

Three procedures may be of particular interest to lawyers: “suppression,” through which Wikipedia deletes from its articles defamatory passages, copyrighted information, or sensitive and confidential information; “blocking,” through which problem users, including users who post defamatory material or copyrighted information, are prevented from editing Wikipedia articles; and Wikipedia arbitration, an arbitration process conducted on and through Wikipedia, through which users may be sanctioned for less serious violations of Wikipedia policy, such as posting one-sided articles.

Suppression

When defamatory or other inappropriate information is posted to Wikipedia, the quickest way to remove it from the main page of the article is by simply deleting it. To delete a passage, one needs only to register as a Wikipedia user by creating an account. Then he or she can simply click on the edit page, select the text, and press the delete key. See [Help Reverting](#), Wikipedia.

Merely deleting information from an article is a temporary and incomplete fix, however. Once the information is deleted, anyone can repost it. Moreover, even if information has been deleted from the article’s front page, it has not been removed from Wikipedia entirely. See [Wikipedia: Oversight](#), Wikipedia. By clicking on the “View history” tab in the right corner of the page, anyone can see the edit history of the document, including all the information that has been deleted from the page. See, e.g., [Revision History of American Bar Association](#).

By having information “suppressed,” however, one can expunge it from Wikipedia entirely so that no record of it exists. [Wikipedia: Oversight](#), Wikipedia. Anyone, regardless of whether he or she is a Wikipedia user, can request suppression by sending an email to oversight-en-wp@wikipedia.org. The complainant only needs to provide the full URL for the article containing the improper conduct, a brief description of what needs removed, and an explanation of why it needs to be removed. The decision as to whether to suppress information is made by one of a group of highly skilled volunteer users appointed by Wikipedia, called “oversighters.” Wikipedia considers suppression to be an extraordinary remedy. Accordingly, only certain types of material are eligible for suppression, including defamatory material, personal identifiers or other highly personal information, copyrighted information, and “highly sensitive and potentially harmful non-public information.” [Wikipedia: Requests for Oversight](#), Wikipedia.

Blocking

While suppression remedies the most serious content violations, Wikipedia’s blocking policy is directed at users who post inappropriate materials such as copyrighted materials, defamatory attacks, and personal identifiers. [Wikipedia Blocking Policy](#), Wikipedia. Under the policy,

Wikipedia may prevent problem users from editing articles by blocking user accounts, IP addresses, and entire ranges of IP addresses for any period of time or indefinitely. Accordingly, the policy is well-suited to preventing a Wikipedia user or users from harassing an individual across multiple Wikipedia articles.

Only Wikipedia users can request a block, but the process is very straightforward. A user must simply go to the Administrators' Noticeboard for Incidents, click on "edit," and enter a description of the user's behavior. [Administrators' Noticeboard for Incidents](#), Wikipedia. Generally, a request to block a user is resolved within only a few days and, in many cases, in less than 24 hours. *See, e.g.*, [Proposed Ban or Block of BenJack07](#), Wikipedia (implementing a block within 24 hours of receiving the request).

Arbitration

Wikipedia's blocking and suppression policies address only the most flagrant abuses by Wikipedia users. Wikipedia has also adopted a variety of other policies governing user conduct such as requiring articles to be viewpoint neutral. *See* [Wikipedia: Arbitration/Index/Principles](#), Wikipedia (identifying Wikipedia policies). Wikipedia users can seek to remedy violations of these secondary policies through Wikipedia's arbitration process.

Wikipedia arbitration can be a valuable tool for businesses and organizations seeking to protect their online reputations. Some users may carry out personal vendettas by posting biased comments about an organization on the organization's Wikipedia article. Removing those comments may only be a temporary fix; a motivated user is likely to repost the comments and an "edit war" may result, in which a comment is continuously removed and then reposted. [Wikipedia: Requests for Oversight](#), Wikipedia.

Unless the comments are defamatory, they will likely not be subject to Wikipedia's Suppression policy. Biased comments do, however, violate Wikipedia's neutrality policy, and problem users who post such comments may be prevented from doing so through Wikipedia arbitration. *See* [Wikipedia: Requests for Arbitration/Chuck F](#), Wikipedia (banning a Wikipedia user and all IP addresses he used for a one-month period due to biased editing).

Wikipedia arbitration is a straightforward process. Like most arbitration, it consists of a request for arbitration, a response, and an opportunity for both the claimant and respondent to submit evidence. [Wikipedia: Arbitration/Guide to Arbitration](#), Wikipedia. There is no oral hearing; the entire process takes place through a Wikipedia page devoted to the case. The parties remain anonymous and are identified only by their usernames. A decision in the arbitration is rendered by the Wikipedia Arbitration Committee, a group of highly experienced Wikipedia users who need not have any legal training. The entire arbitration process generally takes less than two months and, in some cases, less than two weeks.

To initiate arbitration, a user must submit a request for arbitration through Wikipedia's Request for Arbitration page. [Wikipedia: Arbitration/Requests](#), Wikipedia. The request must be 500



words or less. Wikipedia suggests that the request also be supported with a “diff,” a black-lined page that shows the changes an editor has made to a Wikipedia entry. This helps to pinpoint the particular edits that are in dispute. Once a request for arbitration is submitted, the Respondent may post a response, although it is not required.

After a party submits a request for arbitration, the Arbitration Committee decides whether to accept the arbitration. If the committee accepts the case, the next step is for the parties to submit evidence and proposed findings of fact. Each arbitration has its own “evidence” and “workshop” pages. The evidence page typically contains descriptions of the conduct at issue, as well as diffs illustrating the behavior. In contrast, the workshop page hosts proposed findings of fact and suggested remedies, which can be drafted by the parties or other Wikipedia users arbitrators. Wikipedia has a wealth of resources from past Wikipedia arbitrations online, including evidence and workshop pages as well as rulings from previous arbitrations. See [Wikipedia: Arbitration/Index/Cases](#), Wikipedia.

After considering the evidence, the Arbitration Committee will reach a decision. If the Arbitration Committee finds for the complainant, it can invoke several possible remedies. Such remedies commonly include banning users from editing certain articles or banning them from editing any articles related to particular topics. See [Wikipedia: Arbitration/Active Sanctions](#), Wikipedia. Users may be banned either indefinitely or for a specific period of time, such as a year. To enforce these remedies, Wikipedia may block computers at certain IP addresses from editing Wikipedia.

In sum, Wikipedia remains a dangerous tool that can be misused to harm a business, an organization, or an individual. Fortunately, Wikipedia has implemented procedures that address its potential for misuse. These procedures, which are free and easy to use, may be of use to lawyers asked to remedy the publication of defamatory, copyrighted, sensitive, or biased material on Wikipedia.

Keywords: litigation, commercial, business, Wikipedia, defamation, suppression, arbitration

Thomas C. Goodhue is an associate with Hunton & Williams in Washington, D.C.

Combating Jurors' Improper Internet Usage and Winning

By Robin H. Jones and H. Eli Lightner II – November 3, 2011

REPORT FROM JURY DUTY: defendant looks like a murderer. GUILTY. Waiting for opening remarks.

REPORT FROM JURY DUTY: guy I thought was up for murder turns out to be defense attorney. Bet he murdered someone anyway.



REPORT FROM JURY DUTY: Attorneys presenting “evidence.” Since when are security photos, DNA, and testimony evidence? Trusting intuition.

REPORT FROM JURY DUTY: Now forcing my autograph on other jurors. Also starting whisper campaign of innocence based on Magic 8 Ball.

@SteveMartinToGo on Twitter, December 20–21, 2010.

As it turns out, comedian Steve Martin’s account from “the box” was fictional, but the Internet’s invasion into the courtroom is no joke.

Virtually everyone in the United States has access to the Internet, many via smartphones, which are expected to outnumber feature phones by the end of 2011. And while the infiltration of the Internet into all aspects of our daily lives needs little explanation, the sheer scale bears mention. For example, although Facebook has only existed since 2004, 500 million users collectively post more than 60 million status updates per day. Less than two years ago, Google reported at least one billion searches per day. Last year, Twitter claimed approximately 50 million tweets per day.

This ongoing revolution means more information is improperly coming into and leaving the jury box, leaving courts and parties scrambling to preserve the sanctity of the jury trial. Indeed, the days of warning jurors to avoid influence from newspapers, World Book Encyclopedias, family, and friends have given way to attempting to prevent jurors from heading to the Internet via blogs, Twitter, Facebook, Google, Yahoo, Wikipedia, and similar sites to search for or broadcast case-related information.

The Irresistible Urge to Share

As social creatures, humans instinctively want to share experiences and communicate with one another. During jury duty, however, jurors are asked to abandon this desire. Some have a hard time doing so, and the accessibility of the Internet provides these jurors with an easy outlet. One of the more infamous examples of a juror electronically sharing information during the course of a trial involved the high-profile Philadelphia fraud trial of former Pennsylvania Senator Vincent Fumo. *United States v. Fumo*, 639 F.Supp. 2d 544 (E.D.Pa. 2009). Juror Eric Wuest posted the following on his Twitter account in advance of the verdict: “Stay tuned for the big announcement on Monday everyone!” and “This is it . . . no looking back now!” The posts, which were discovered by the media covering the trial, prompted Fumo to move for a mistrial. The court ultimately held that the posts did not warrant a new trial because the posts suggested that the jury’s decision was already made, so it was too late to influence Wuest. Further, there was no evidence that anyone responded to the posts, that Wuest discussed the matter with his fellow jurors, or that the posts demonstrated a disposition toward either party.

Similarly, in *Smead v. CL Financial Corp.*, 2010 WL 6562541 (Cal. Superior Sept. 15, 2010), the court rejected a motion for a new trial where two jurors described their jury duty on Facebook. The first juror reported frustrations about the length of trial, stating, among other

things, “I have tried very hard to keep things moving along.” The second juror also commented about the length of trial, and when a Facebook friend made a statement that lawsuits are out of control, she replied “no argument.” The plaintiff argued that these comments exhibited the jurors’ attempt to sidetrack full and fair deliberations and their skepticism toward and prejudice against those who file lawsuits. The court denied the plaintiff’s motion, holding that the comments alone were insufficient to create an inference that the jurors had abandoned their sworn duty.

Like *Smead*, the court in *New Hampshire v. Goupil*, 908 A.2d 1256 (N.H. 2006), found a juror’s pretrial blog posts were too vague to demonstrate a predisposition to guilt. In *Goupil*, following the defendant’s conviction, it was learned that, prior to reporting for jury duty, one of the jurors had posted on his blog that he was going to “listen to the local riff-raff try to convince me of their innocence.” Not surprisingly, the defendant argued on appeal that such a post displayed the juror’s predisposition toward the guilt of the accused. The court disagreed, however, finding the post too vague to support such a theory and noting the lack of evidence that the juror solicited outside input regarding his vote in the case.

These and other examples demonstrate that the *outflow* of case-related information is generally found to be insufficient to warrant a mistrial or new trial. The reality is that courts are reluctant, absent evidence of outside influence or prejudice, to declare a mistrial or disturb a jury verdict when a juror makes online comments. To the contrary, outside information infiltrating the jury room—the *inflow* of information—often leads to a mistrial or new trial.

Curiosity Killed the Trial

Too many jurors take it upon themselves to conduct their own *Law & Order*-style investigation of the case, which includes researching anything from the issues in the case to the parties, attorneys, and witnesses participating in the trial. One obvious problem with jurors relying on outside information is that it negates the judicial process. Indeed, the court and the parties take extensive steps to closely regulate what evidence is allowed in—and excluded from—the court room. Not surprisingly, mistrials have resulted when, among other things, Wikipedia printouts were found in the jury room, jurors printed out definitions of legal terms from other jurisdictions, and a juror researched to determine an alternative cause of death and shared that information with his cohorts.

Perhaps one of the more egregious instances of extrajudicial juror investigation was a taser death case in which two jurors read on the taser manufacturer’s website that tasers are nonlethal. See Andrew Wolfson, *Taser Death Verdict Challenged Over Juror’s Conduct*, Louisville Courier-Journal, Jan. 9, 2010, available at 2010 WLNR 795830. As one would expect, when the court learned that the jurors swayed their fellow jurors with this information, the verdict exonerating the police officer defendant was set aside.

In *State of Virginia v. Danny Cecil*, 655 S.E.2d 517 (2007), the court reversed a felony sexual abuse conviction after two jurors looked up the Myspace profile of one of the alleged victims and

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shared its contents with other jurors. This information was revealed to the court after the jury foreman called a lawyer friend, who was not involved in the case, for advice concerning what had happened in the jury room and that attorney relayed the information to the defendant's attorney. Even though nothing relevant was revealed, the court stated "the mere fact that members of a jury in a serious felony case conducted any extra-judicial investigation on their own is gross juror misconduct which simply cannot be permitted."

A less extreme example is *Zarzine Wardlaw v. State of Maryland*, 971 A.2d 331 (Md. App. 2009). There, the alleged victim of rape suffered from oppositional defiant disorder (ODD). One juror learned through her own research that lying was a trait associated with ODD and shared this information with other jurors, one of whom informed the judge by written note. The judge denied the defendant's motion for mistrial, but it was reversed on appeal because the victim's credibility was a crucial issue in the case.

Moreover, simply replacing a rogue juror may be an insufficient remedy, as noted in *State of New Jersey v. Scott*, 2009 N.J. Unpub. LEXIS 1901 (N.J.App. Div. July 20, 2009). There, the trial court convicted three cousins charged with manslaughter. During the proceedings, one of the jurors announced to the other jurors that she had conducted Internet research on the defendants, the victims, and even the possible sentence accompanying a conviction. The trial court replaced that juror with an alternate and denied a mistrial, but the appellate court disagreed and overturned the conviction.

Nip It in the Bud

The court is typically made aware of improper accessing of extrajudicial information when jurors either report wayward jurors or admit to their own misconduct. While many disobedient jurors are caught, there are surely others who go undetected. Strictly sequestering jurors during every trial would prevent jurors from straying, but this measure simply is not feasible. Other measures must be taken to prevent the Internet's invasion into the courtroom.

Potential jurors must be told early and often about outside influences and the problems that potentially accompany their ventures onto the Internet during jury duty. Perhaps the best way to plant this seed is in the jury summons. In addition to relaying the usual information (when and where to report, etc.), a jury summons should also contain a noticeable warning to prospective jurors about researching and communicating via the Internet and other sources while on jury duty. See "[Proposed Internet Related Jury Instructions](#)," [PDF] American College of Trial Lawyers (containing proposed instructions and certifications for use in jury summons and at trial). Additionally, every court's web page, which generally provides basic information about jury service, should contain a similar notice addressing this issue. These warnings should employ language tracking that is used in the adopted and proposed initial jury instructions discussed below.

Another means of hammering the Internet message home for prospective jurors is a juror questionnaire, which many courts employ to obtain a juror's qualifications and basic information

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prior to service. Questionnaires offer a greater opportunity than the jury summons to reiterate the warnings relating to juror Internet usage, as well as to obtain a written confirmation that jurors understand and will comply with the directive not to obtain or disseminate case-related information via outside sources. Such a confirmation was incorporated into the juror questionnaire issued in the recent Barry Bonds trial. See [Barry Bonds Juror Questionnaire](#) [PDF].

Once a jury is selected, the court's introductory remarks should again set forth the directive that the jurors are not to improperly use the Internet or consult outside sources. To that end, several jurisdictions are proposing and adopting new pattern jury instructions to account for jurors' potential Internet usage. For example, in January 2010, the Judicial Conference of the United States, which sets the policies for all federal courts except the Supreme Court, forwarded to all federal judges a set of suggested jury instructions addressing Internet usage. [January 2010 Judicial Conference Letter](#) [PDF].

The recommended pretrial instruction reads as follows:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the Internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the Internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any Internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

While these instructions are a good start, there are a few things that might improve their effectiveness.

First, many jurors hear the jury instructions but do not fully understand the gravity of the consequences if they violate them. Thus, in addition to prohibiting the use of the Internet and other outside sources, the court should also explain to the jury that disobeying such an instruction will likely result in a mistrial or vacated verdict, which means any time the jurors, the court, and

the parties have devoted to the trial will be wasted. Moreover, the jurors should also be told in general terms the financial toll that potentially results from their misdeeds. Indeed, not only are the court costs (i.e., taxpayer money) associated with administering the trial essentially wasted, but the parties' expenses (attorney fees, lodging, travel, trial preparation, trial technology, etc.) will be squandered. Further, the financial sacrifices some juror's have made to perform their civic duty would also be for naught. Even if this message was generally conveyed earlier via a jury summons or other instrument, it should be reiterated to stress the importance of the Internet prohibition. Additionally, although included in many pattern instructions, the court should emphasize each juror's obligation to report any potential misconduct by other jurors.

Some jurisdictions are taking a hardline approach to juror misconduct relating to Internet usage. For instance, New York has enacted laws placing a juror in contempt for improper Internet usage. N.Y. Jud. Law § 753(A)(6). Likewise, in 2009, a New Hampshire juror caused a mistrial and was charged with contempt when he revealed to other jurors that by conducting his personal Internet research, he had discovered the defendant was a registered sex offender—a fact that had been purposely excluded from trial. Annmarie Timmins, *Juror becomes a defendant; Research of sex offender brings contempt charge*, Concord Monitor, Mar. 26, 2009, available at 2009 WLNR 5657916. Last year, a Michigan juror was fined \$250 and ordered to write a five-page essay on the Sixth Amendment after she posted on her Facebook page that it was “gonna be fun to tell the defendant they're GUILTY.” Associated Press, [“Detroit-area juror fined, ordered to write essay for talking ‘guilty’ defendant on Facebook,”](#) mlive.com, Sept. 2, 2010.

Placing jurors on notice that their improper Internet activity might also result in fines, essays, or possible jail time would certainly get the attention of most jurors; it might also remove the comfort that accompanies the perceived anonymity of the Internet. Accordingly, to the extent penalties are available in the jurisdiction, the court's first instructions to the newly impaneled jury should also explain the fines and punishments that accompany improper use of outside sources during trial.

In addition to the court reading the Internet-related jury instruction to the panel at the start of trial, instruction should also be provided to the jury in hard copy format. Today's jurors increasingly assimilate information better visually than aurally, which lends support to this approach. See, e.g., Sonya Hamlin, “Who Are Today's Jurors and How Do You Reach Them?” 2001 *Litigation*, Vol. 27, No. 3, at 9, 11. Further, to the extent not already done so via a juror questionnaire, such a handout can take the form of a certification that the juror must sign confirming that he or she understands the instruction and will abide by it. Ultimately, requiring jurors to sign such a confirmation, providing them with a copy of the instruction to retain for reference throughout the proceeding, and restating the instruction prior to each significant break should increase the likelihood of wholesale compliance.

Fact-Finding Missions

While the foregoing measures would surely increase juror compliance with Internet-related instructions, there will still be jurors who stray. Consequently, it would also be prudent for the

lawyers in the case to protect their clients from tainted verdicts by gathering as much information as possible about jurors' Internet footprints and routinely searching the Internet during trial for material that has the potential to improperly influence a jury verdict.

In addition to providing an opportunity to have jurors certify that they understand the instructions regarding the use of outside sources while on jury duty, juror questionnaires can also provide valuable information about a potential juror's Internet presence that will be beneficial not only in selecting a panel, but also in subsequently policing that panel's Internet use at trial. Some might contend that inquiring about a juror's Internet activity in a juror questionnaire is too invasive. Asking a potential juror if he or she has a Facebook or Twitter account, however, is no more invasive than asking a juror to identify his or her hobbies, list the magazines he or she reads, name the television programs he or she regularly watches, or relay the message of any bumper stickers that might be on his or her car—all of which are just some of the questions included in juror questionnaires used by more than one U.S. district court. *E.g.*, U.S. District Court for the Southern District of Alabama, [Juror Questionnaire](#) [PDF]; *see also* [Barry Bonds Juror Questionnaire](#) [PDF] (containing questions about each juror's Internet usage).

Thus, courts should consider—and parties should push for—the adoption of uniform juror questionnaires that seek, among other things, information regarding a potential juror's Internet activity, including information on each juror's web memberships, web aliases, blogs, reading habits for online periodicals, and propensity to post comments to online articles. To the extent a court does not incorporate such questions into a form juror questionnaire, the parties should request the use of a supplemental juror questionnaire that delves into these topics. The accuracy and completeness of information about an individual's Internet activity will undoubtedly be closer to 100 percent when the questions are answered privately via a juror questionnaire, which promises confidentiality, rather than in *voir dire* before a large crowd of strangers. Additionally, with most juror questionnaires, the individual must confirm, under penalty of perjury, that all answers are true and correct, which creates another level of certainty about the juror's responses.

Similar to a juror questionnaire, *voir dire* provides a chance to ask general and specific questions of potential jurors about a number of topics, including their Internet activity. Obviously, questions in this forum must be deftly handled so as not to be intrusive or embarrassing for an individual providing responses in front of the entire jury pool. Nevertheless, the general information gained through *voir dire* can be used not only to police jurors ultimately selected for trial but also, depending on timing of the actual jury selection, it can be used to inform a party's choices for the panel.

Finally, with the information obtained via questionnaires or *voir dire*, the parties should attempt to police juror Internet activity during trial. This would include, among other things, routinely running relevant Internet searches as well as visiting a juror's public Facebook, Twitter, or similar social networking page—but not “friending” or otherwise attempting to connect with a juror. Additionally, it would be wise to set up one or more Google Alerts using relevant and



unique terms or names from the trial, which will help monitor articles or blogs on the subject that may involve the jurors.

Conclusion

Potential jurors' access to the Internet is only going to become more convenient as technology evolves. Consequently, lawyers and the court must be proactive in educating jurors about the pitfalls accompanying inappropriate Internet activity during jury service. Beyond that, the parties must be vigilant in monitoring jurors' use of the Internet during trial. The foregoing preventive measures are seemingly easy to employ and, while no feasible solution is perfect, will unquestionably go a long way toward either avoiding altogether the fallout that accompanies jurors' misuse of the Internet or, alternatively, protecting the parties from having outside influences affect their jury verdict.

Keywords: litigation, commercial, business, Internet, juries, mistrial

Robin H. Jones is a partner with Starnes, Davis, Florie, LLP, in Birmingham, Alabama. H. Eli Lightner II is an associate in the firm's Birmingham office.

NEWS & DEVELOPMENTS

The Presumption of Irreparable Harm Is Gone

In *Bosch, LLC v. Pylon Mfg. Corp.*, 2011 U.S. App. LEXIS 20700 (Fed. Cir. Oct. 13, 2011), the Federal Circuit has taken an opportunity to put to rest and confirm that the Supreme Court in *eBay, Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006), jettisoned the presumption of irreparable harm as it applies to determining the appropriateness of injunctive relief.

In *Bosch*, the Federal Circuit has again chipped away at patentees seeking to enforce patent rights. As a result, patentees should definitely follow *Bosch*'s lead in establishing a strong factual basis for the irreparable harm element of the injunction analysis, as the good old days of just showing a likelihood of success on the merits and then relying on the presumption of irreparable harm that follows are gone.

Keywords: litigation, commercial, business, Federal Circuit, irreparable harm

— *Andrew Crain, a partner at Thomas, Kayden, Horstemeyer & Risley, LLP*

Supreme Court Rejects Global Warming Lawsuit

The U.S. Supreme Court recently struck down two first-of-their-kind lawsuits in which several states, the City of New York, and three private land trusts sought to hold four private power

companies and the Tennessee Valley Authority (a federally owned power plant) accountable for global warming based on a public-nuisance theory under federal common law. Specifically, in *American Electric Power Co. v. Connecticut*, No. 10-174, 131 S. Ct. 2527 (June 20, 2011), the Court held that the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, displaced federal tort claims against emitters of carbon dioxide.

In light of the growing controversy surrounding global warming, *American Electric* indicates that federal courts may not be the proper forum to address this complicated issue. The Court expressly left open the question of whether state law may be used to redress such complaints. Specifically, because the plaintiffs raised state-law claims that the Second Circuit chose not to reach, the plaintiffs will have an opportunity on remand to argue that state law entitles them to their requested injunctive relief. In determining whether the plaintiffs' state-law claims are viable, the Second Circuit will have to consider whether Congress, in passing the Clear Air Act, demonstrated a "clear and manifest" intent to preempt the plaintiffs' claims.

Notably, in the administrative realm, the EPA has indicated that it will take final action on a proposed rule to limit greenhouse gases by May 2012. *See* 75 Fed. Reg. 82392. Regardless of what action, if any, the EPA takes, environmental groups likely will challenge the EPA's actions or inactions as insufficient to reduce emissions. In future litigation, we expect the EPA and its opponents to hotly contest the impact of the Court's statements in *American Electric* concerning the proper role of courts and administrative agencies in the climate-change debate. Undoubtedly, the EPA will rely on the fact that the Court trumpeted the EPA's expertise and ability to tackle the multifaceted issues involved with global warming, as well as the Court's admonishment that courts should not decide the tough policy questions wrapped up in climate change. Unless environmental groups can overcome these obstacles, their only likely recourse will be to continue lobbying for change in the executive and legislative branches of government.

Keywords: litigation, commercial, business, global warming, Clean Air Act, federal common law, displacement

—[Sally K. Sears Coder](#) is a partner in the Chicago office and [Damon Thayer](#) is an associate in the Los Angeles office of Jenner & Block, LLP.

Fifth Circuit Overturns Arbitration Award Against Officers

The Fifth Circuit recently reversed the district court's confirmation of an arbitration award against the chief executive officer and chief financial officer of several corporations and remanded the case for further proceedings based on the conclusion that the two officers had not agreed to be personally bound by the agreements that contained an arbitration provision. *DK Joint Venture 1, et al. v. Richard W. Weyand, et al.*, 2011 WL 3342370 (C.A.5 (Tex.)).



In reversing the confirmation of the arbitration award, the Fifth Circuit first noted that the application of principles of contract and agency law may result in a nonsignatory to an arbitration agreement being bound by its terms. But, in a fact-specific analysis, the Fifth Circuit concluded that although Weyand and Thiessen were agents of the defendant corporations, the mere fact that the defendant corporations entered into the subscription agreements did not cause their agents, Weyand and Thiessen, “who acted only as officers on behalf of the corporations, to be personally bound by those agreements.” The court then distinguished between two lines of cases, noting that the important factual distinction in all of the cited cases was whether the party resisting arbitration was a signatory or not.

The next point addressed by the Fifth Circuit was the argument that it must defer to the arbitration panel’s determination that it had jurisdiction over Weyand and Thiessen because the arbitration language gave the arbitration panel the power to determine its own jurisdiction. The court also rejected this argument, noting that a dispute as to whether the parties entered into an arbitration agreement in the first place was an issue to be resolved by a court and not by an arbitrator.

Keywords: litigation, commercial, business, Fifth Circuit, arbitration awards, arbitration provisions

—*Mitzi Turner Shannon, partner, Kemp Smith, LLP, El Paso, Texas*

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